No. 17902

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of
McDaniel's Markets, a California corporation,
Bankrupt.

Irving I. Bass, Trustee,

Petitioner,

vs.

Rialto Publishing Company, and Triad Newspapers, Inc.,

Appellants.

APPELLEE'S BRIEF.

Nat Rosin,
Bertram H. Ross,
Harry L. Schuman,
1813 Wilshire Boulevard,
Los Angeles 57, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 17902

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of
McDaniel's Markets, a California corporation,
Bankrupt.

Irving I. Bass, Trustee,

Petitioner,

vs.

Rialto Publishing Company, and Triad Newspapers, Inc.,

Appellants.

APPELLEE'S BRIEF.

I.

STATEMENT OF THE CASE.

The facts are comparatively simple. On June 22, 1961 both appellants sued McDaniel's Markets and attached cash belonging to McDaniel's Markets. On July 14, 1961 appellant Triad Newspapers, after default judgment against McDaniel's Markets, levied a writ of execution against said attached funds and received the sum of $1,666.99 therefrom. On July 19, 1961, appellant Rialto Publishing Company also obtained a default judgment against McDaniel's Markets

and under a writ of execution thereon received the sum of $2,550.05.

On September 15, 1961 an involuntary petition in bankruptcy was filed against McDaniel's Markets and adjudication followed. Thereafter, petitions and orders to show cause were brought by the Trustee against these appellants and the Referee, the Honorable Russell B. Seymour, made a finding of fact that on the date of the attachments McDaniel's Markets was insolvent but the attaching creditors (appellants herein) had no reason to believe McDaniel's Markets was insolvent; but that at the date of the levy of the writ of execution and payment thereunder, the appellants had reasonable cause to believe McDaniel's Markets to be insolvent; and thereupon Referee Seymour in his conclusions of law, concluded that the payments under the writs of execution constituted voidable preferences and that the Trustee was entitled to the funds that had been paid over to the appellants.

On review to the District Court, the findings of fact and conclusions of law of the Honorable Russell B. Seymour were confirmed and adopted by the Honorable Leon J. Yankwich, Judge of the District Court.

Contrary to the appellants' contention that the issue raised was whether at the date of the attachment appellants had reasonable cause to believe the debtor insolvent and not having such reasonable cause at that time, the petition fails, it appears rather from the findings and conclusions that the issues were decided in favor of the appellee Trustee on the question of knowledge of insolvency at the time of the writ of execution and payment thereunder.

II.

SUMMARY OF ARGUMENT.

The appellants' opening brief (p. 2) shows that the petition of the Trustee was to set aside the lien obtained by the attachment *and* subsequent execution. However, in appellants' Statement of Contentions and Specification of Errors (App. Br. p. 4), they concede that the only question of law involved is whether the "transfer" of funds occurred at the time when the attachment was levied, when they had no reasonable cause to believe McDaniel's Markets to be insolvent; or if the "transfer" occurred when the moneys were paid to the appellants as attaching creditors under their respective writs of execution (when they did have reasonable cause to believe McDaniel's Markets to be insolvent), and they stipulated that McDaniel's Markets was insolvent at both dates.

It is the contention of the appellee that the date of the writ of execution and payment of moneys to the appellants thereunder is the date that governs this court in determining whether the "transfer" was made when the debtor was insolvent, while the creditor had reasonable cause to believe the debtor to be insolvent, and that the title to the money changed only upon the levy of the writ of execution.

III.

ARGUMENT WITH POINTS AND AUTHORITIES.

A. A Preferential Transfer Has Been Effected by Payment to Appellants of Moneys by Virtue of Writs of Execution.

Appellants' Statement of Contentions and Specification of Errors, in Summary of Argument, and indeed, its Argument with Points and Authorities, all concede that the elements of a preference under Section 60a(1) of the Bankruptcy Act is present (11 U. S. C. A. 96a(1)), to wit: there was a transfer as defined by the Bankruptcy Act of property of the debtor made to a creditor on account of an antecedent debt suffered by such debtor while insolvent and within four months before the filing against the debtor of a petition initiating the proceedings under this Act. As a last item, the "transfer" at whatever date presumably made enabled the attaching creditor to obtain a greater percentage of his debt than some other creditor of the same class.

The Referee entered its conclusions of law [pp. 2-3 of the Findings of Fact and Conclusions of Law and Order Thereon], concurred in by the Honorable Leon J. Yankwich, that by the payment under the writ of execution "a dimunition of assets available to creditors was caused and the said respondent(s) was thereby enabled to obtain a greater percentage of his debt than were other creditors of the same class.

B. A Preferential Transfer May Be Voided by the Trustee as Appellants Had Reasonable Cause to Believe the Debtor to Be Insolvent.

By these proceedings under Section 60b of the Bankruptcy Act (11 U. S. C. A. 96(b)) the preferential transfer may be avoided by the Trustee if the creditor receiving it has at the time when the transfer was made, reasonable cause to believe that the debtor was insolvent.

We believe that the appellant did admit, and his brief appears so to admit, that if this court determines the "transfer" to be made at the time of the levy of the writ of execution and the payment thereunder, all the other elements of a voidable preference were present and the transfer could be set aside by the Trustee. However, it is obvious that the argument of the appellants is to the effect that the "transfer" was made at the time the writ of attachment was levied and because of the fact that at that time they did not have reasonable cause to believe the debtor to be insolvent that it would not constitute a preferential transfer voidable on the part of the Trustee.

This then brings us to the final phase of the problem and the most important phase of the problem, to wit, the effective date of the "transfer" of the moneys attached by appellants.

C. The Transfer Was Made When the Moneys Where Turned Over to the Appellants After Judgment and by Virtue of the Writs of Execution.

Section 60a(2) of the Bankruptcy Act (11 U. S. C. 96(a)2 defines a transfer to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee.

The answer then hinges on the characteristics of an attachment under the laws of the State of California.

Erie Railroad Co. v. Tompkins, 304 U. S. 64; 82 L. Ed. 1188.

Attachment in California is not a remedy but is merely ancillary to the ultimate goal, viz., the recovery of a judgment.

Vol. I, Witkin's California Procedure, p. 888.

It is contingent and uncertain in its terms being dependent upon an outcome of the proceedings favorable to the plaintiff. It does not affect the title of the debtor to the property.

6 Cal. Jur. 2d, p. 338.

In *Ward v. Commissioner of Internal Revenue,* 224 F. 2d 547 which arose in this circuit in 1955, the court, consisting of the Honorable Richard H. Chambers, the Honorable Albert Lee Stephens and the Honorable Leon J. Yankwich, in discussing the law in California as to attachments, stated at page 551

"Under California law an attachment is an auxiliary proceeding . . . the attachment is merely

> a sequestration of the debtor's funds to abide the judgment. They will remain the property of the debtor and title to them passes to the attaching creditor *only* after a judgment in his favor has been entered in which case the lien of the attachment is merged in the judgment." (Emphasis ours.)

If title to the funds passes only after a judgment, can the argument of appellant be sustained that a transfer was made to appellant at the time of the attachment. We believe appellant is confusing the word "transfer" with "possession". No title to the funds passed by virtue of the writ of attachment. "Transfer" is defined in Section 1039 of the Civil Code of the State of California to be ". . . an act of the parties, or of law, by which the *title* to the property is conveyed from one living person to another." (Emphasis ours.)

It would therefore appear that the word "transfer" as used in the Bankruptcy Act is interpreted under the laws of California and in view of the above section of the Civil Code of the State of California quite apparently title to the funds is not passed to the appellants by virtue of the writs of attachment. It would also appear that not even possession of the funds attached has passed to the creditor-appellant under the writ of attachment. We believe it to be a matter of common knowledge among attorneys practicing in the State of California that it is an officer of the court, usually a sheriff or marshal, that has the attached funds physically in his possession.

In *United States v. Security Trust and Savings Bank,* 340 U. S. 47, 95 L. Ed. 53, the question pre-

sented was whether a tax lien of the United States was prior in right to an attachment lien where the Federal tax lien was recorded subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment. In determining and interpreting the law in California as to the status of the attachment, the Supreme Court of the United States stated at page 50

> ". . . if the State court itself describes the lien as inchoate, this classification is practically conclusive. . . . The Supreme Court of California has so described the attachment lien in the case of *Puisseur v. Yarbrough,* 29 Cal. 2d 409, 412; 175 P. 2d 830, 831, by stating that the attaching creditor obtains only a potential right or contingent lien. . . . Examination of the California statute shows that the above is an apt description. The attachment lien gives the attaching creditor no right to proceed against the property unless he gets a judgment within three years or within such extention as the statute provides. Numerous contingencies might arise that would prevent the attachment from ever becoming perfected by a judgment awarded and recorded. *Thus the attachment lien is contingent or inchoate—merely a lis pendens notice that a right to perfect the lien exists.*" (Emphasis ours.)

The Supreme Court in the above case of *United States v. Security Trust and Savings Bank, supra,* went on to state that the doctrine of relation back which by the process of judicial reasoning merges the attachment lien in the judgment and relates the judg-

ment lien back to the date of the attachment, operates to destroy the realities of the situation.

This being the status in California of an attachment, the language in the case of *Golden Hill Distilling Co. v. Logue,* 243 Fed. 342 at 348 would appear particularly appropriate:

> ". . . the general purpose of the Act . . . can only be effectuated, and . . . inconsistencies and uncertainties are best reconciled and classified, by holding that the creditor who recovers a judgment, by consent or in invitum, and by execution sale collects his money within four months preceding bankruptcy, and with reasonable cause to believe . . . receives a voidable preference."

See also:

> *Horowitz v. Huber* (D. C. N. Y. 1929), 34 F. 2d 979.

Under the law in California as above set out, the levy of attachment is contingent or inchoate. Appellants' argument would lead to the conclusion that the judgment and subsequent levy of execution relates back and is merged in the attachment but the law would appear to be exactly contrary to such a position. As stated in *Ward v. Commissioner of Internal Revenue, supra,* at page 551, the "lien of the attachment is merged in the judgment".

We believe it is this theory that the editorial writers of Colliers (Volume 4, Colliers on Bankruptcy, 14th Edition) had in mind when it related at page 112, Section 67.11, Footnote 11 as cited on page 10 of

appellants' opening brief. Our own case would appear to fall squarely within the rule as there set out that if the lien (of attachment) was obtained when the debtor was insolvent and the other elements of a preferential transfer existed, but the transfer was not voidable because the creditor did not then have reasonable cause to believe the debtor to be insolvent, but when the appellant received payment (by the writ of execution after judgment) in satisfaction of the lien, at a time when appellant had reasonable cause to believe the debtor was insolvent, a voidable preference is established.

It is entirely possible that the law in states other than in California give much more effect to an attachment lien than does the law in California. The effect, however, of the use of attachments in California must be determined by California law.

> *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

The appellant is seemingly arguing that their position must be sustained by virtue of the facts and law as they interpret it as above set out, and therefore they are entitled to keep the money under Section 60 as a voidable preference has not been made out; and that the Trustee is not entitled to relief under Section 67 of the Bankruptcy Act (11 U. S. C. A. 107) because of the fact that no liens any longer exist as the moneys have all been paid over to the attaching creditors.

We believe this is fallacious reasoning in that it would appear that even under Section 67 of the Bankruptcy Act the only thing that would stand in the way

of the Trustee's retaking the money from the appellants would be that the Trustee would have to resort to plenary proceedings; but here appellant has submitted to jurisdiction as they have pointed out in their brief, and therefore the matter could be tried summarily by the Referee. It would also appear that under the statement set forth in Volume 4, Colliers, *supra,* that the moneys could be recovered under Section 67 of the Act even though it has been paid over to the attaching creditors.

Wherefore, your appellee submits that the decision of the Honorable District Judge requiring the return of the moneys to the Trustee in Bankruptcy be sustained.

Respectfully submitted,

NAT ROSIN,
BERTRAM H. ROSS, and
HARRY L. SCHUMAN,
By HARRY L. SCHUMAN,
Attorneys for Appellee.

Certificate.

I certify, that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRY L. SCHUMAN,